



June 10, 2009

Ms. Amelia Brown  
Consumer and Governmental Affairs Bureau  
Disability Rights Office  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**EX PARTE NOTICE**

**Re: *In the Matter of Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers*, CG Docket 05-231, ET Docket 99-254**

Dear Ms. Brown:

This letter responds to your request for clarification regarding the Commission's recent revisions to its closed captioning complaint procedures and their impact on cable operators' obligations to protect subscriber privacy under Section 631 of the Communications Act.<sup>1</sup>

By way of background, broadcast television programming, leased access programming, and certain other types of programming (*e.g.*, programming provided on public, educational and government (PEG) channels) are beyond cable operators' editorial control. Thus, the Commission has properly placed the responsibility for closed captioning compliance directly upon such programming providers rather than the cable operator.<sup>2</sup> However, when closed captioning issues arise, particularly with respect to broadcast television programming, consumers are sometimes uncertain as to the entity accountable for captioning compliance, and thus often file closed captioning complaints with the cable operator rather than with the responsible programming provider.

Previously, cable operators could return a misdirected closed captioning complaint directly to the consumer, providing the name and address of the correct party to whom the complaint should be sent.<sup>3</sup> This option allowed cable operators to comply with closed captioning complaint procedures while avoiding potential concerns over revealing any personal information of the type prohibited from disclosure under the subscriber privacy rules.

Recently, however, the Commission modified its closed captioning complaint procedures to *require* a cable operator receiving a closed captioning complaint regarding programming over which it does not have editorial control to forward the complaint within seven days to the programming provider and notify both the consumer and the Commission that it has done so.<sup>4</sup> We believe that this

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<sup>1</sup> 47 U.S.C. § 551.

<sup>2</sup> See 47 C.F.R. § 79.1(e)(9).

<sup>3</sup> See *In the Matter of Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers*, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, at n. 50 (rel. Nov. 7, 2008) ("2008 Order").

<sup>4</sup> *Id.* at ¶ 25.

mandate directly conflicts with the subscriber privacy protections of Section 631 of the Communications Act, which prohibit cable operators from disclosing a subscriber's "personally identifiable information" to third parties.<sup>5</sup> "Personally identifiable information" would include the subscriber's name and other information typically included in closed captioning complaints.<sup>6</sup>

Although cable operators may disclose "personally identifiable information" with the "prior written or electronic consent of the subscriber,"<sup>7</sup> it is not feasible for cable operators to obtain subscriber consent and forward a misdirected closed captioning complaint to the appropriate party within seven days. Furthermore, cable operators are left with no recourse under the revised complaint procedures where the consumer refuses to provide that consent, and must choose between violating either the subscriber privacy protections of Section 631 or the seven-day time limit. And as a practical matter, consumers may be reluctant to provide their consent when requested in this context, particularly if they do not understand why it is required.

The statute also permits disclosure where "necessary to render, or conduct a legitimate business activity related to cable service..."<sup>8</sup> However, in a previous Order, the Commission interpreted this exception to not apply to the release of subscriber complaints. For instance, due to concerns with disclosure of private information contained in subscriber complaints made to cable operators regarding the technical quality of their service, cable operators may provide only aggregate data regarding such complaints when requested by the Commission and local franchising authorities, rather than the complaints themselves.<sup>9</sup> Accordingly, we do not believe that cable operators reasonably should be expected to rely upon this exception to the subscriber privacy protections of Section 631, at least not without further formal guidance from the FCC.

Please do not hesitate to contact me with any questions regarding this matter.

Very truly yours,



Cristina Pauzé  
Vice President, Federal Regulatory Affairs

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<sup>5</sup> See 47 U.S.C. § 551(c)(1).

<sup>6</sup> See S. Rep. No. 98-67, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1983), at 28 ("The phrase '...personally identifiable information' covers the various ways that individuals can be identified, including name, address, and social security number"). See also 47 U.S.C. § 551(c)(2)(C)(ii)(I) (prohibiting disclosure of information that would reveal the "extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator").

<sup>7</sup> 47 U.S.C. § 551(c)(1).

<sup>8</sup> *Id.* at § 551(c)(2)(A). Other exceptions that are not relevant in this context would permit disclosure to governmental entities pursuant to a court order (47 U.S.C. § 551(c)(2)(B)) and disclosure of a subscriber's name and address (but no other information) under certain limited conditions (47 U.S.C. § 551(c)(2)(C)).

<sup>9</sup> See *Cable Television Technical and Operational Requirements*, Memorandum Opinion and Order, 7 FCC Rcd 8676, ¶ 39 (1992). The Commission adopted a similar approach with respect to subscriber complaints concerning rates charged for cable television service. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, n. 348 (1993).